No. 06-766

In The Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,

Petitioners,

v.

MARGARITA LOPEZ TORRES, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE LAW PROFESSORS GUY-URIEL E. CHARLES, ERWIN CHEMERINSKY, KAREEM CRAYTON, STEVEN P. CROLEY, HEATHER K. GERKEN, MICHAEL KANG, ELLEN D. KATZ, ETHAN J. LEIB, MICHAEL PITTS, AND DANIEL P. TOKAJI IN SUPPORT OF RESPONDENTS

ELLEN D. KATZ
Counsel of Record
625 S. State Street
Ann Arbor, Michigan 48109
(734) 647-6241

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE PROCESS NEW YORK STATE EMPLOYS TO NOMINATE STATE TRIAL JUDGES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS	4
A. A STATE'S NOMINATING PROCESS MAY NOT DENY PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES	6
B. NEW YORK STATE'S NOMINATING PROCESS DENIES PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES	13
C. NEW YORK STATE'S NOMINATING REGIME ADVANCES NO LEGITIMATE OR COMPELLING STATE INTEREST	21
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Am. Party of Tex. v. White, 415 U.S. 767 (1974) 19, 20, 22, 23

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 27

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) ... *passim*

Clingman v. Beaver, 544 U.S. 581 (2005) 18

Cousins v. Wigoda, 419 U.S. 477 (1975) 8, 25, 26

Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981) 25, 26, 27

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 7, 23, 25, 26

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) 29

Jenness v. Fortson, 403 U.S. 431 (1971) 19

Kusper v. Pontikes, 414 U.S. 51 (1973) 7, 10, 22

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 27

Lubin v. Panish, 415 U.S. 709 (1974) 7, 11, 15, 18, 19

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 10

Nixon v. Condon, 286 U.S. 73 (1932) 6, 9, 17

Nixon v. Herndon, 273 U.S. 536 (1927) 6, 9

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 21

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*) 23, 27

TABLE OF AUTHORITIES – Continued

Page

Smith v. Allwright, 321 U.S. 649 (1944) 6, 9

Smith v. Doe, 538 U.S. 84 (2003) 29

Storer v. Brown, 415 U.S. 724 (1974) 22

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 23

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) ..... *passim*

Terry v. Adams, 345 U.S. 461 (1953) 6, 9, 10

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 7

United States v. Classic, 313 U.S. 299 (1941) 6, 9, 11, 14, 19

Williams v. Rhodes, 393 U.S. 21 (1968) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

N.Y. Const. art. VI, § 6(c) 13

N.Y. Elec. Law § 6-106 ..... 13, 16

N.Y. Elec. Law § 6-124 ..... 13, 14, 16, 17

N.Y. Elec. Law § 6-126 14

N.Y. Elec. Law § 6-134(4) 14

N.Y. Elec. Law § 6-136(2)(i) 14, 16

N.Y. Elec. Law § 6-136(3) 14, 16

N.Y. Elec. Law § 6-158(5) 14, 18

N.Y. Elec. Law § 6-160(2) 14

INTEREST OF AMICI CURIAE

The law professors named below teach and write about elections, voting rights, political parties, and electoral competition. Both basic and advanced law courses on voting and elections, as well as a wide range of scholarship on these subjects, regularly considers state authority to regulate conduct by political parties, candidates for office, and individual voters. Amici are among the many scholars who write and teach about the issues before the Court in this case.

Based on this expertise, and on careful review of this Court's decisions, amici argue in this brief that the nominating process the State of New York employs to select nominees for state supreme court justice violates the First and Fourteenth Amendments. Amici join this brief solely on their own behalf and not as representatives of their universities.[1]

Amici are:

Guy-Uriel E. Charles, Russell M. And Elizabeth Bennett Professor of Law, University of Minnesota Law School

Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science, Duke University School of Law

---

[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Kareem Crayton, Assistant Professor of Law and Political Science, University of Southern California, Gould School of Law

Steven P. Croley, Professor of Law, University of Michigan Law School

Heather K. Gerken, Professor of Law, Yale Law School

Michael Kang, Assistant Professor of Law, Emory Law School

Ellen D. Katz, Professor of Law, University of Michigan Law School

Ethan J. Leib, Associate Professor of Law, Hastings College of Law

Michael Pitts, Associate Professor of Law, Indiana University School of Law – Indianapolis

Daniel P. Tokaji, Assistant Professor of Law, Ohio State University Moritz College of Law

SUMMARY OF ARGUMENT

States need not make judicial offices elective, but those that opt to do so may not lock their citizens out of the electoral process. This is precisely what the State of New York has done. It mandates a nomination process that facially invites party members to participate in the selection of candidates and then imposes a series of structural barriers that functionally rescind the invitation. The regime effectively excludes all candidates except those hand-picked by party leaders and impermissibly denies members of political parties a realistic opportunity to participate in the selection process.

Part I of this brief argues that members of political parties possess constitutionally grounded interests in

participating in the selection of their party's candidates. Precedent of longstanding identifies significant limits on state power to restrict such participation. Among these limits is that states may not deny members of political parties a realistic opportunity to participate in the selection of their party's candidates.

Part II of this brief argues that the cumbersome regime New York State employs to nominate its state trial judges denies party members this opportunity to participate. The process is burdensome not because it dispenses with a direct primary or because it relies on a political convention as a component of the process. Instead, the burden arises from the combined operation of critical components of New York's intricate nominating regime.

Under this regime, bona fide party members who meet the qualifications for judicial office and enjoy considerable public support but are not favored in advance by party leadership are unable to clear all the state-imposed hurdles necessary to elect supportive convention delegates, and are unable to lobby meaningfully the delegates who are selected. Party members interested in the nomination of such judicial candidates cannot vote for delegates who might support their nomination, given that no such delegates appear on the primary ballot, and the primary election itself is routinely cancelled due to lack of contest. The burden that results is severe.

Part III of this brief shows that the system New York State employs to nominate state trial judges is unconstitutional because it is not sufficiently related to the achievement of any legitimate or compelling government purpose. The regime deprives party members of any meaningful opportunity to participate in the selection of candidates and thus undermines the associational interests it is said

to protect. It makes judicial candidates beholden to party bosses and thus damages rather than enhances judicial independence and confidence in the judiciary. The regime simply fails in practice to promote diversity in the judiciary. These failings are compounded by an opaque and misleading process that obscures the power it lodges with party leaders. New York State may not both expressly invite participation in the nomination process by the party rank and file and then impose a series of requirements that ensure this opportunity for participation will be meaningless.

ARGUMENT

THE PROCESS NEW YORK STATE EMPLOYS TO NOMINATE STATE TRIAL JUDGES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The Court of Appeals described the process New York State employs to elect its state trial judges as a "network of restrictive regulations [that] effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention." Pet. App. 53.[2] The appellate court held that this state-mandated nominating process infringes the First and Fourteenth Amendment rights of both voters and candidates seeking access to the process. *Id.* at 85.

That judgment should be affirmed. New York State need not elect its state supreme court justices, and sound policy reasons would support a decision to dispense with

[2] "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1a-92a) and district court (Pet. App. 93a-185a).

such a practice. But if there are good reasons to elect judges, New York State's system does not reflect any of them. Insofar as judicial elections make judges accountable to the people and not to established institutions, New York State's system makes them beholden to party bosses. Insofar as elections make judicial accountability transparent, New York State's system obscures the connection between the elected and the electorate and surreptitiously lodges power in the proverbial smoked-filled back room. Insofar as elections promote vibrant political parties, New York State's regime usurps the autonomy of political parties to structure decisionmaking for themselves. In all, a worse system for electing judges is difficult to imagine.

The judgment below identifies a clear and circumscribed limit on state power to regulate the activities of political parties. Specifically, it provides that states that choose to have judicial elections may not deny party members a realistic opportunity to participate in the nomination of their party's candidate. Under this test, a state may not simultaneously mandate a nominating process that calls for delegate selection by voters in a party primary and then impose a series of structural obstacles that effectively exclude bona fide party members from meaningful participation.

The judgment below does not call into question state power to mandate nomination by convention or to employ hybrid systems that combine an indirect primary with a nominating convention, so long as such systems lack the state-imposed obstacles to participation the court found to inhere in the New York scheme. Finally, the judgment below says nothing whatsoever about the power of a political party itself to restrict participation by its rank and file membership in a nominating process. The power

of a political party to impose such restrictions is not at issue in this case.

What is at issue is a state's power to stage judicial elections so as to nullify the participation of party members. When a state opts to make a judicial office elective, it may not deny party members a realistic opportunity to participate in the selection of their party's candidates. A state may not invite its citizens to vote and then lock them out. Yet that is precisely what the State of New York does in mandating a process that formally invites such participation but functionally excludes all candidates except those hand-picked by party leaders. The Court of Appeals held that the Constitution prohibits the State from imposing such a system. This Court should affirm that judgment.

A. A STATE'S NOMINATING PROCESS MAY NOT DENY PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES.

This Court has long recognized that members of political parties possess constitutionally grounded interests in participating in their party's nomination process. Precedent identifies significant limits on state power to restrict such participation.

At the most basic level, states may not engage in fraud when counting ballots cast by party members in state-administered primaries. *See United States v. Classic*, 313 U.S. 299 (1941). States may not exclude or facilitate the exclusion of party members from party primaries based on their race, *see Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S.

536 (1927), or based on a party member's past participation in the primary of another political party, *see Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Nor may states impose onerous filing fees that functionally deny potential candidates access to the primary ballot. *See Lubin v. Panish*, 415 U.S. 709, 718 (1974); *Bullock v. Carter*, 405 U.S. 134, 146 (1972).

Limitations on state power to restrict participation in a party's nomination process reflect the fact that the nomination process constitutes "the crucial juncture at which the appeal to common principles may be translated into concerted action." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). The Court has consequently recognized that party members possess concrete participatory and associational interests in taking part in that process free from state interference. *See, e.g.*, *Pontikes*, 414 U.S. 51, 58 (1973) ("A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in [the candidate] selection process."); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575, 586 (2000) ("the moment of choosing the party's nominee" is when "party *members* traditionally find their collective voice and select their spokesman") (emphasis added); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230-31 (1989) (emphasizing as particularly strong "the associational rights at stake" when "party *members* . . . seek to associate . . . with one another in freely choosing their party leaders.") (emphasis added); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 371 (1997) (Stevens, J., dissenting) ("The *members* of a recognized political party unquestionably have a constitutional right to select their nominees for public office") (emphasis added); *Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting) ("The ability of the *members* of

the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom") (emphasis added); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in result) ("[A]t the very heart of the freedom of assembly and association" is "[t]he right of *members* of a political party to gather in a . . . political convention in order to formulate proposed programs and nominate candidates for political office.") (emphasis added).

In the present case, the lower courts found that the cumbersome process New York State employs to nominate and elect its state trial judges impermissibly burdens the associational interests of party members. The appellate court concluded that the state regime denied members of political parties "a realistic opportunity to participate in the nominating process." Pet. App. 41-42.

Petitioners contend that New York State may do just that. They argue that a state-mandated nominating process may deny members of political parties any "realistic opportunity" to participate in it so long as a state (1) allows party members access to the general election ballot; and (2) refrains from imposing restrictions on the nomination process that are race-based or similarly invidious. *See* Att'y General of New York Br. 28-30 (AG Br.); New York State Bd. of Elections Br. 17-18, 26-28 (NYSBE Br.); New York County Democratic Committee & New York Republican State Committee Br. 16, 38 (Party Br.). This argument is flawed in several respects.

1. This Court has flatly rejected the contention that access to the general election ballot provides a sufficient remedy for barriers to access at the nomination stage. *See Bullock v. Carter*, 405 U.S. 134, 146-47 (1972). This insufficiency is perhaps most apparent when the nomination

process is dispositive of outcome, as it is here, thereby rendering participation in the general election a mechanical gesture at best. *See id.* at 146 (finding significant "the fact that the primary election may be more crucial than the general election"); *United States v. Classic*, 313 U.S. 299, 318 (1941) (holding that constitutional protections attach "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice"). But even where the general election remains competitive, this Court has refused to "accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens . . . imposed by state law." *Carter*, 405 U.S. at 146-47; Pet. App. 54-57.

2. The *White Primary Cases* famously established that a state may not exclude or facilitate the exclusion of voters from a party primary based on race. Doing so constitutes invidious discrimination within the meaning of the Fourteenth Amendment, *see Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927), and infringes a participatory interest protected under the Fifteenth Amendment. *See Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

The primaries challenged in *Smith v. Allwright* and *Terry v. Adams* burdened this participatory interest because they excluded African-American voters from the sole locus of meaningful electoral decisionmaking within the jurisdiction. *Smith* and *Terry* both emphasized the decisive character of the challenged primaries, and both posited a participatory interest in access to that juncture. *Smith* highlighted the "right to participate in the *choice* of elected officials" and emphasized the state's inability to nullify this "opportunity for *choice*." *Smith*, 321 U.S. at

664 (emphasis added). In *Terry*, Justice Black observed that black voters were denied "an effective voice" and "strip[ped]" them "of every vestige of influence in selecting [elected] officials." *Terry*, 345 U.S. at 466, 470 (opinion of Black, J.); *see also id.* at 484 (Clark, J., concurring) ("[T]he Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.").

This Court's precedent makes clear that even racially neutral restrictions burden protected interests if they deny party members "an effective voice" in a political party's nomination process. In *Kusper v. Pontikes*, the Court observed that the challenged state law, which required a voter to register with a party twenty-three months in advance of the primary election to vote in the primary, impermissibly burdened associational interests because it blocked a party's newest members from participating in the party's nomination process. Describing the nomination of candidates as a political party's most "basic function," the Court held that the state-mandated restriction undermined the voter's "prime objective" for joining a party: it denied her "any *voice* in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." *Pontikes*, 414 U.S. at 58 (emphasis added); *see also Morse v. Republican Party of Virginia*, 517 U.S. 186, 207 (1996) (race-neutral barrier to participation by party members in nomination phase "does not merely curtail their voting power, but abridges their right to vote itself").

These state-imposed burdens are magnified where the nomination process is outcome determinative. *See, e.g.*, *Carter*, 405 U.S. at 146 (1972) (emphasizing that "the primary election may be more crucial than the general

election in certain parts of Texas"); *Classic*, 313 U.S. at 314 (obstacles imposed on the nomination process are "as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance").

The "moment of choosing the party's nominee" is the "'crucial juncture' at which party members traditionally find their collective voice and select their spokesman." *Jones*, 530 U.S. at 575, 586 (quoting *Tashjian*, 479 U.S. at 216); *see also Lubin*, 415 U.S. at 716 (participatory interests impermissibly burdened where qualification for ballot access is "measured solely in dollars"). The associational and participatory interests of party members hinge on access to this juncture.

3. *Cal. Democratic Party v. Jones*, 520 U.S. 567 (2000), does not suggest that members of political parties lack associational and participatory interests "to be included" in their party's nomination process, notwithstanding petitioners' claim to the contrary, *see* NYSBE Br. 21; Party Br. 34. Unlike this case, *Jones* did not involve an alleged divergence between the interests of party members and the interests of party leaders. Indeed, the decision supports recognition of party members' distinct interests.

Jones rejected the contention that California's blanket primary was necessary to prevent the disenfranchisement of voters who were not members of the majority party in safe electoral districts. *See* 530 U.S. at 573 n.5, 583. *Jones* makes clear that the right to vote, as protected by the Constitution, does not entitle voters to state-mandated access to the primary of a party to which they do not belong. *Id.* at 573 n.5 (rejecting contention that "the 'fundamental right' to cast a meaningful vote [was] really at issue in this context").

This limited proposition, however, does not support petitioners' argument that a state-mandated *exclusion* of bona fide party *members* from their party's nomination process burdens no cognizable participatory or associational interest of those members. *Jones* addressed not the participatory interests of party members seeking access to their own party's primary, but instead an interest asserted on behalf of nonmembers claiming an entitlement to access the primary of a party they refused to join. *Jones*' finding that nonmembers are not disenfranchised absent state-mandated access to the party primary says nothing about whether party members might possess distinct associational and participatory interests that entitle them to such access. *Jones*, 530 U.S. 573 n.5 (stating that "the associational 'interest' in selecting the candidate of a group to which one does not belong . . . falls far short of a constitutional right").

But whether or not party members might be so entitled is not even before the Court in the present case. The question presented here is solely whether New York State may require a nominating system that effectively excludes party members from participation. This case does not require the Court to resolve whether a state could compel such access against the wishes of the party's leadership, or whether party members are otherwise entitled to such access when they are excluded by party rule.

Affirming the decision below accordingly does not require the Court to recognize that respondents possess an interest in "untrammeled access," "compulsory access," or "state-enforced access" to a political party's nomination processes, despite petitioners' statements to the contrary. NYSBE Br. 11, 17, 26. It instead requires that the Court

find that *state-imposed obstacles* to the nomination process impermissibly burden respondents' associational and participatory interests.

Jones, in fact, supports the claim that state-imposed obstacles to such participation give rise to distinct harm. In rejecting a proffered justification for the blanket primary, *Jones* suggested that a nonmember "voter who feels himself disenfranchised should simply join the party." 530 U.S. at 584. That suggestion makes little sense if the state remained free to mandate the exclusion of party members from the party's nominating process. *See id.* (distinguishing "a state-imposed restriction" on freedom of association from limitations on association that are privately chosen); *see also Carter*, 405 U.S. at 147 (emphasizing the "burdens . . . imposed by state law").

B. NEW YORK STATE'S NOMINATING PROCESS DENIES PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES.

The cumbersome regime New York employs to nominate its state trial judges severely burdens the associational and participatory interests of party members. New York State mandates both that voters elect Supreme Court justices, *see* N.Y. Const. art. VI, § 6(c), and that rank-and-file party members select delegates to the nominating conventions at state-run party primary elections. *See* N.Y. Elec. Law §§ 6-106, -124. New York State then conditions access to the primary ballot on hefty signature requirements and geographic restrictions on eligibility that invariably produce but a single, uncontested slate of delegates chosen by the party's leadership. Pet. App. 100. State law mandates that this uncontested slate is "deemed

elected" without appearing on the primary ballot. *See* N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3), -160(2); Pet. App. 12-13.

State law then requires that a nominating convention follow shortly after the primary at which the nominally elected delegates select judicial nominees. *See* N.Y. Elec. Law §§ 6-124, -126, -158(5). The district court found that no opportunity existed to discuss potential nominees with convention delegates and that the "structural and practical impediments" to such discussions "are insurmountable." Pet. App. 100. That court described the conventions themselves as "perfunctory, superficial events . . . [that] do not determine candidates, but rather formally endorse determinations made elsewhere." Pet. App. 125.

Finally, New York State creates and relies on noncompetitive judicial districts in which judicial candidates ostensibly "run" for election. These districts make clear that the nominating process in practice is not simply an integral part of the procedure of choice, but that it also invariably "effectively controls the choice." *See* Pet. App. 22-23; *United States v. Classic*, 313 U.S. 299, 318, 325 (1941).

Taken together, the components of New York's regime severely burden the associational and participatory interests of party members. Potential office seekers like Respondent Judge Margarita Lopez Torres – bona fide party members who meet the qualifications for judicial office and enjoy considerable public support but are not favored in advance by party leadership – cannot "clear all the hurdles necessary to elect supportive delegates," Pet. App. 100, and confront "insurmountable" obstacles in seeking to lobby the delegates who are selected. *Id.* Party members interested in the nomination of judicial

candidates like Judge Lopez Torres cannot vote for delegates who might support her nomination, given that no such delegates appear on the primary ballot, and the primary election itself is routinely cancelled due to lack of contest. Pet. App. 13, 17, 63.

New York's labyrinthine regime functions like the primary filing fees invalidated by this Court in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), in that the regime precludes meaningful participation by potential candidates "no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Carter*, 405 U.S. at 143. But while those filing fees limited voter choice in the party primary, *see Lubin*, 415 U.S. at 716 (filing fees meant party members could cast a vote "for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot"), New York's regime typically eliminates choice altogether, by routinely deeming unchallenged delegates "elected" and cancelling the primary election as a matter of course. Pet. App. 12-13.

Without doubt, conduct by individuals acting within this state-mandated regime contributes to the burdens respondents confront. State law does not facially command that the leadership of the political parties run a coordinated slate of convention delegates; it does not compel convention delegates to "rubber stamp" the candidates the party leadership supplies; and it does not expressly foreclose individual party members from securing a place on the primary ballot to become a convention delegate from their assembly districts, even though such standalone candidacies never occur.

But while New York State does not expressly compel all the conduct that contributes to the burden respondents confront, it does more than passively allow problematic practices to occur. Through its statutory regime, New York State actively facilitates the exclusion of candidates not favored by party leaders.

New York State law makes access to the primary ballot contingent on compliance with complex signature and residency requirements that must be satisfied in a relatively short statutory period. *See* N.Y. Elec. Law §§ 6-106, -124; Pet. App. 106-08. State law not only mandates that convention delegates reside within the judicial district at issue, but also requires that each of the component assembly districts, subunits that number between nine and twenty-four for each judicial district, send delegates to the convention. *See* N.Y. Elec. Law §§ 6-106, -124; Pet. App. 106-08. State law makes ballot access contingent on signatures from 500 residents from each assembly district who have not already signed a petition for another qualified candidate, *see* N.Y. Elec. Law § 6-136(2)(i), (3), a requirement that vastly limits the pool of signatories, routinely renders many signatures invalid, and functionally requires that those seeking access to the ballot as a candidate for convention delegate obtain far more than the statutorily mandated 500 signatures to obtain, in fact, the required number of valid ones. Pet. App. 12, 13, 108.

New York State provides for no information on the primary ballot apart from the actual names of the candidates, a practice that requires candidates for delegate (or those who support them) to educate voters through advertisements or personal contacts about the candidate seeking election. Pet. App. 13, 107. Finally, New York State law cedes to the major political parties authority to set the

ultimate number of delegates needed for each assembly district. *See* N.Y. Elec. Law § 6-124.

The district court found that, viewed as a whole, these requirements were "uniquely burdensome" and "virtually guarantee[d]" that the party leadership will "dominat[e]" the selection of convention delegates and alternates. Pet. App. 100. The court found that state law affirmatively "enabled" the major political parties "to make a challenger candidate's effort to elect a majority of delegates more difficult." Pet. App. 106-07. The trial judge accordingly found "unsupportable" the contention that "a candidate for the office of Supreme Court Justice who lacks party leader support can clear all the hurdles necessary to elect supportive delegates to the convention." Pet. App. 100; *see also id.* at 167.

The power exerted in New York State's process by the party leaders is far from happenstance. This power is, instead, the necessary and long demonstrated consequence of the intricate and tortuous nomination process New York State requires. *See generally Williams v. Rhodes*, 393 U.S. 31, 35, 37 (1968) (Douglas, J., concurring) (describing "entangling web of [state] election laws" that required "elaborate political machinery" to satisfy); *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down state law that allowed party executive committee to define membership eligibility after the committee excluded African-American voters from dispositive nomination process).

To be sure, an individual party member might conceivably secure a place on the primary ballot for convention delegate in a single assembly district. But these standalone candidates exist only in petitioners' imagination. *See* NYSBE Br. 9; Party Br. 17, 42; AG Br. 16, 28. No such person ever runs because doing so is an exercise in

futility. Even if this imagined candidate could secure the requisite signatures and successfully earn a spot at the convention, the absence of debate and discussion at this state-mandated convention renders participation a pointless endeavor. As the district court found, convention delegates "do not actually perform deliberative, consultative, informed roles," and that even if they were "amenable to such tasks and attempted to perform them," the period state law mandates for potential deliberation "is so unreasonably brief that it would doom them to failure." Pet App. 116-17; 122; *see also* N.Y. Elec. Law § 6-158(5).

Petitioners appear to concede as much and indeed acknowledge that Judge Lopez Torres must run a slate of delegates if she is to compete meaningfully for her party's nomination. AG Br. 30, 32; NYSBE Br. 32. Petitioners do not dispute the district court's finding that Judge Lopez Torres is structurally disabled from clearing the hurdles to doing so and thus that she cannot do what she must to challenge a "candidate supported by a highly organized and effective political party." NYSBE Br. 32. Petitioners nevertheless call the need to run a slate of delegates a "practical rather than legal" requirement and suggest that this characterization somehow neutralizes the resulting burden. NYSBE Br. 32.

This suggestion ignores the applicable inquiry. Justices on this Court have long called for a "realistic assessment of regulatory burdens on associational rights" and an "examination of the cumulative effects of the State's overall scheme." *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring). This assessment "should focus on the realities of the situation, not on empty formalism." *Id.*, at 610 (Stevens, J., dissenting); *see also Lubin*, 415 U.S. at 719 n.5 (finding write-in

alternative insufficient given "[t]he realities of the electoral process"); *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971) (rejecting access that is "merely theoretical")); *Carter*, 405 U.S. at 143 (barriers to candidacy must be examined "in a realistic light" that includes "the extent and nature of their impact on voters"); *Classic*, 313 U.S. at 313, 319 (discussing "the practical operation of the primary law" and noting that its "practical influence . . . may be so great" as to control the ultimate outcome "even though there is no effective legal prohibition upon the rejection at the [general] election of the choice made at the primary").

The reality here is that New York State mandates a cumbersome nominating regime that predictably operates to deny party members a realistic opportunity to participate in the nomination process. This regime provides judicial candidates like Judge Lopez Torres and the party members who wish to support her no meaningful access to the nomination process. *See generally Carter*, 405 U.S. at 143 ("the rights of voters and the rights of candidates do not lend themselves to neat separation"); *Lubin*, 415 U.S. at 716 ("voters can assert their preferences only through candidates"). Instead, the State invites rank and file members of political parties to participate in a state-mandated primary, and then imposes a host of structural obstacles that effectively rescind the invitation and render participation a charade. Compounding the harm is the fact that the state-created nomination process routinely dictates the ultimate victor. The result is a regime that severely burdens respondents' associational and participatory interests.

New York State might have avoided this burden by imposing a direct primary that eliminated the convention as a component of the nomination process, but it is not the absence of a direct primary that renders the challenged system burdensome. Political parties have long relied on political conventions to nominate candidates, and this Court has made clear that states may require that political parties nominate their candidates through such conventions. *See Am. Party of Tex.*, 415 U.S. at 781 (holding that a state "may insist that intraparty competition be settled before the general election . . . by party convention"). Contrary to petitioners' claims, AG Br. 18-27, 29; Party Br. 7-12, 20-23; NYSBE Br. 15, 25, affirming the decisions below would not call this longstanding practice into question.

New York State's nomination process is burdensome not because it dispenses with a direct primary or because it relies on a political convention as a component of the process. Instead, the burden arises from the combined operation of critical components of New York's intricate nominating regime. These include the signature and residency requirements, the need to educate voters about delegate propensities outside the ballot itself, the large number of delegates required (as dictated by the parties exercising power ceded by the State), the short period between the primary and the convention, and the absence of competition in the general election.

New York State need not have structured its nomination process in this manner. The State, however, opted to create a hybrid system, and specifically invited party members to participate in the nomination process through a state-mandated indirect primary. But rather than implement this system with subsidiary rules that

facilitated meaningful participation, the State imposed barriers that rendered such participation impossible. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) ("If the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.").

Judge Lopez Torres, of course, holds no entitlement to her party's nomination. Nor are any individual party members assured that their party will nominate the judicial candidates they prefer. New York's failure to guarantee either result certainly does not give rise to a legally cognizable burden. But while respondents are not entitled to victory, they are entitled to a process in which the State has not simultaneously invited their participation and ensured their participation will be meaningless. When a state chooses to structure in meticulous detail how a political party selects judicial candidates, and specifically provides that party members will have a vote in that process, the state impermissibly burdens the associational and participatory interests of those members when the resulting process entirely denies them any prospect of meaningful participation. As the district court aptly stated, "[a]n election must always retain the essential qualities of an election." Pet. App. 165.

C. NEW YORK STATE'S NOMINATING REGIME ADVANCES NO LEGITIMATE OR COMPELLING STATE INTEREST.

Because New York State's nomination process severely burdens the associational and participatory interests of party members, the regime's validity rests on whether it is necessary to advance a compelling state interest. *See, e.g.*,

American Party of Texas v. White, 415 U.S. 767, 780 (1974) (validity of restrictions on nomination "depends upon whether they are necessary to further compelling state interests") (citing *Storer v. Brown*, 415 U.S. 724, 729-33 (1974)); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("a significant encroachment upon associational freedom cannot be justified by a mere showing of a legitimate state interest"); *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (applying "close scrutiny" to filing fee requirement). New York State's nomination process not only fails under this "close scrutiny," but is also deficient under less rigorous review because it lacks a sufficient connection to any legitimate state interest.

Petitioners claim that the challenged regime advances the associational interests of political parties, enhances judicial independence and confidence in the judiciary, and promotes diversity in the judiciary. AG Br. 25-27; NYSBE Br. 6-7; Party Br. 37-41, 44-47. These are all worthy goals. The problem lies not with them, but in the categorical failure of the State's regime to advance any of them. In fact, the regime operates affirmatively to undermine the first two proffered goals, and is only tenuously related to the third.

1. This Court has never suggested that political parties' leaders possess an associational interest in excluding the party's rank and file from critical junctures in the nominating process. If anything, precedent suggests just the opposite.

This Court has "considered it 'too plain for argument' . . . that a State may require parties to use the primary format for selecting their nominees, in order to assure that intra-party competition is resolved in a democratic fashion." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572

(2000) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)). The Court's recognition of state power to mandate participation by a party's rank and file membership in the candidate selection process necessarily assumes the state may exercise this power without infringing any cognizable associational interest of the party itself. *See Jones,* 530 U.S. at 572; *see also Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) (arguing that states "may lawfully require that significant elements of the democratic election process be democratic – whether the Party wants that or not."); *Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567, 584 n.57 (D.C. Cir. 1975) (*en banc*) (noting as an example of American exceptionalism "the degree to which the selection of party candidates is entrusted even to the party rank and file").

The Court, moreover, has long recognized that the Constitution limits state interference with party members' freedom of association. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."). Indeed, while repeatedly recognizing the critical importance of the nomination process to the associational freedom of a political party, the Court has emphasized and celebrated the role of party members in that process. *Cal. Democratic Party v. Jones*, for instance, emphasized that party members have an associational interest in selecting candidates absent the influence of nonparty members, and explicitly noted that "[t]he ability of the party leadership to endorse a candidate is simply no substitute for the party *members'* ability to choose their own nominee." 530 U.S. at 580 (emphasis added); *see also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230-31 (1989) (emphasizing as

particularly strong "the associational rights at stake" when "party *members* . . . seek to associate . . . with one another in freely choosing their party leaders.") (emphasis added); *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting) (noting state power to protect "the general party membership against . . . minority control," suggesting a preference for party decisionmaking "by democratic ballot" to party convention, and equating "the Party" with what "a majority of the Party's members . . . favor" and with "the views of the Party's rank and file").

Petitioners' insistence that party leaders possess an associational interest in excluding party members from the nomination process also renders nonsensical a widely-noted passage from *Jones*. NYSBE Br. 26-28, Party Br. 37-41. The Court in *Jones* suggested that non-party members might remedy any perceived injury from their exclusion from determinative party primaries by "simply join[ing] the party." 530 U.S. at 585. Just as this proposal suggests an absence of state power to mandate the exclusion of such new members from the nomination process, *see supra*, it also implies that party leaders must lack authority to require such exclusions. The existence of the power to do so, whether exercised by the State or the party's leadership, renders the Court's proposal in *Jones* a meaningless endeavor.

2. Even if political parties possessed an associational interest in excluding their members from the nomination process, New York State's nominating regime does not promote that interest.

Precedent makes clear that political parties possess significant associational interests in structuring party affairs free from state interference. This Court has struck down numerous state laws that it concluded intruded too

deeply into party autonomy. *See, e.g.*, *Jones*, 530 U.S. at 567 (invalidating state law mandating a blanket primary as illegal intrusion on party autonomy to choose standard bearer); *Tashjian*, 479 U.S. at 208 (invalidating state law that blocked party from including independent voters in party primary); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 126 (1981) (upholding party autonomy to adopt and enforce rules governing national conventions that disregard state laws restricting the election of convention delegates); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (same). *See also Eu*, 489 U.S. at 216 (invalidating state law that prohibited parties from endorsing candidates in primary and that "dictate[d]" the party's structure and composition). In each of these cases, the Court found that the State interfered with a party's power to organize itself by seeking to structure party decisionmaking in a manner the party itself opposed.

In the present case, petitioners do not complain that a state law has impermissibly burdened their associational interests by intruding on their power to structure party decisionmaking. They instead seek preservation of a state-mandated nominating process that they insist promotes the party's associational freedom. New York State's nominating regime, however, does no such thing.

New York's regime concentrates power in the party's leadership and thereby structures party decisionmaking in a manner petitioners desire. That state law dictates a decisionmaking structure that the leadership of a political party might select for itself does not mean that the New York's regime promotes the party's associational interests. Petitioners' insistence that it does fails to distinguish the policy from its source. They focus shortsightedly on the benefits they perceive themselves to enjoy under the

challenged regime, Party Br. 37-38, and in the process fail to recognize the gross intrusion on party autonomy New York State's nominating process represents. By restricting participation by the party rank and file in the nomination process, New York State's regime appropriates to the State the freedom of political party members to determine party structure and leadership free from state interference. This intrusion exists even if, in a completely unregulated regime, the party itself might have chosen to structure party decisionmaking in the same manner mandated by New York State. *See Eu*, 489 U.S. at 225 n.15 (emphasizing that "the parties' alleged consent ignores the independent First Amendment rights of the parties' members").

The distinction between state law and party preference critically informs precedent from this Court and from several lower courts, but is wholly ignored by petitioners. AG Br. 30-31; NYSBE Br. 27-28; Party Br. 37-41. This Court, for instance, has held that a state impermissibly burdens the associational interests of a political party when it compels the inclusion of nonmembers in the party primary, *see Jones*, 520 U.S. at 567, even though the party itself may invite nonmembers to participate in its nominating process. *See Tashjian*, 479 U.S. at 208. The Court has also held that states may not compel political parties to seat delegates at their party conventions where those delegates were selected in accordance with state-mandated processes that the party rejects. *See Wisconsin ex rel. LaFollette*, 450 U.S. at 107; *Wigoda*, 419 U.S. at 477. Requiring the inclusion of such delegates burdens the associational interests of political parties even though the parties might select those very procedures for themselves. *Compare Tashjian*, 479 U.S. at 216-17 (upholding associational freedom of political party to include nonmembers in

nominating process) *with Wisconsin ex rel. LaFollette*, 450 U.S. at 124 (associational freedom of political party includes power to reject delegates selected at state primary at which nonmembers participated).

Lower courts have likewise recognized this distinction between party power and state rule by upholding the ability of political parties to structure participation in party affairs in a manner not available to a state. *See, e.g., Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) (associational freedom encompasses party power to mandate that men and women comprise equal proportions of state delegation to national convention); *Ripon*, 525 F.2d at 585 (political party may choose "among various ways of governing itself . . . the one which seems best calculated to strengthen the party and advance its interests," even if that choice allocates delegates in manner that dilutes the voting strength of some members); *see also LaRouche v. Fowler*, 152 F.3d 974, 996-98 (D.C. Cir. 1998) (associational freedom of political party includes power to exclude candidate as unqualified under party rules and disregard votes cast for him).

Longstanding recognition of the principle that political parties possess associational interests in structuring their affairs for themselves does not support recognition of state power to dictate those structures. Whatever autonomy parties possess, a state does not have the power to entrench candidates favored by party leaders to the detriment of party members. The exercise of such state power necessarily undermines that associational freedom.

3. Even if petitioners possessed the associational freedom they claim to exclude their members from the nomination process, and even if that interest could be advanced by a state regime that dictates rather than

allows this result, New York State's nomination process, which facially allows for rank and file participation but in reality precludes such participation, advances that interest only by obfuscation.

New York State invites participation by the party rank and file in the nomination process, but this invitation is not a genuine one. State law provides for the election of delegates to the party convention at a state-run primary in which party members may vote, but then imposes a series of requirements that ensure this opportunity for participation will be meaningless.

If New York State wants to promote the power of the party leadership within the nomination process, numerous avenues are available. The State might eliminate the election of judges entirely and adopt an appointive system in which state officials look to party leaders for recommendations about which candidates to appoint. Alternatively, New York State might continue to allow for the election of state trial judges while providing by explicit legislation that party leaders nominate the candidates for State Supreme Court Justice. The State might require a pure convention system where the party itself would design the rules for participation and presumably party leaders would play a decisive role. Or the State might deregulate the nomination process entirely, and leave to the party the power to select the structure for the nomination of candidates.

Any of these regimes would lodge decisionmaking power in the party leadership more directly and transparently than the system invalidated below, a system that facially invites participation by the party rank and file but which functionally excludes party members from participation. This Court has emphasized the need for such

transparency in a variety of contexts, making clear that the process selected to achieve a legitimate government policy must not conceal or obscure the source and content of the policy. *See generally Smith v. Doe*, 538 U.S. 84, 99 (2003) ("Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 787 (1982) (discussing measures that "blur[] the lines of political accountability").

4. This lack of transparency also explains why New York State's nominating regime is insufficiently linked to the State's interest in promoting judicial integrity, confidence in the judiciary, and diversity among trial judges.

Judicial integrity and confidence in the judiciary might be fostered by insulating judicial candidates from direct voter involvement in their selection. New York State's hybrid system, however, limits such involvement not by explicit statutory command but instead by a misleading regime that facially invites voter participation but functionally lodges critical decisionmaking power in local party leaders. New York State may prefer appointment to election as a means to select judges, but "transform[ing] a de jure election into a de facto appointment" is not a permissible means to secure that end. Pet. App. 70.

In fact, New York State's regime actively thwarts the very good government practices petitioners claim the system promotes. The district court noted "[t]he record of financial contributions by candidates for Supreme Court Justice" to local political leaders, Pet. App. 136, a practice that suggests the State's regime produces not independently-minded judges, but instead ones who owe fealty to the party leadership. This state-mandated return to the "smoke-filled room" accordingly frustrates interests in

judicial integrity and confidence in the judiciary. *See* Pet. App. 149 n.36.

So too with diversity. Even assuming that a nominating process lacking direct voter involvement best fosters diversity – an assumption contradicted by experience, *see* Pet. App. 74 ("over the course of 85 years the nominating process has, to put it mildly, failed to fully effectuate the state's goals as to geographic and racial diversity") – a process that invites such voter involvement but renders that involvement a sham is an impermissible path to the desired goal.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

ELLEN D. KATZ
Counsel of Record
625 S. State Street
Ann Arbor, Michigan 48109
(734) 647-6241

Counsel for Amici Curiae